DISTRICT COURT, DENVER, COLORADO 1437 Bannock Denver, CO 80202	DATE FILED: October 18, 2019 2:57 PM CASE NUMBER: 2019CV302
Plaintiff(s): PUEBLO EDUCATION ASSOCIATION; SUZANNE ETHEREDGE; and ROBERT DONOVAN v. Defendant(s): COLORADO STATE BOARD OF EDUCATION and PUEBLO SCHOOL DISTRICT NO. 60 BOARD OF EDUCATION	▯ COURT USE ONLY ▯ Case Number(s): 2019CV302 Courtroom: 269

OMNIBUS ORDER RE: DEFENDANT PUEBLO SCHOOL DISTRICT NO. 60 BOARD OF EDUCATION'S MOTION TO DISMISS and DEFENDANT COLORADO STATE BOARD OF EDUCATION'S MOTION TO DISMISS

This matter comes before the Court on Defendant Pueblo School District No. 60 Board of Education's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) and Defendant Colorado State Board of Education's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), filed June 27, 2019. The Court, having reviewed the motion and the responsive briefs, the registry of actions, and applicable legal authority, Finds and Orders the following:

I. BACKGROUND

This case arises out of Defendants' actions pursuant to the Education Accountability Act of 2009 and a management contract with a private entity for purposes of affecting improvement at an underperforming public school in Pueblo School District No. 60 ("School District").

Plaintiffs are the Pueblo Education Association ("PEA"), Suzanne Ethredge, a teacher employed by the School District and President of PEA, and Robert Donovan, a teacher employed by the School District. PEA is a membership organization employed as the exclusive bargaining agent for the School District's teachers, other licensed professionals, and non-management employees. PEA is a party to a collective bargaining agreement with the School District.

Plaintiffs filed their complaint on May 10, 2019, alleging that Defendant Colorado State Board of Education ("State Board") exceeded its constitutional and statutory authority by ordering Defendant Pueblo School District No. 60 Board of Education ("Local Board") to retain a private entity to manage one of its public schools. Plaintiffs further allege that the Local Board failed to perform its constitutional and statutory duties by willfully abdicating control over the public school by obeying the State Board's order and contracting with the private entity.

Constitutional and Statutory Background

The general supervision of the public schools in Colorado is vested in the State Board whose powers and duties are prescribed by law. Colo. Const. Art. IX, § 1. The State Department of Education includes, *inter alia*, the State Board and the Commissioner of Education who is appointed by the State Board. Colo. Rev. Stat. § 22-2-103 (2018); Colo. Const. Art. IX, § 1.

Each public school district is governed by a local board of education elected by voters in the district. Colo. Rev. Stat. § 22-32-103(1) (2018); Colo. Const. Art. IX, § 15. Local boards possess the powers delegated to them by law, and "shall perform all duties required by law." Colo. Rev. Stat. § 22-32-103(1) (2018). Specifically, the Colorado Constitution grants local school boards "control of instruction in the public schools of their respective districts." Art. IX, § 15.

The General Assembly enacted the "Education Accountability Act of 2009," which was codified as Colo. Rev. Stat. §§ 22-11-101, *et seq*. (the "Act") to hold the state, school districts, the institute, and individual public schools accountable. *Id*. The Act contemplates creation of a state review panel, and a uniform statewide system for various Department of Education actors to evaluate performance, establish accreditation categories for public school districts, report issues, and make recommendations for rewarding success and providing support for improvement at each level. *Id*.

Case Background

Risley International Academy of Innovation ("Risley") is a Pueblo public school that serves an educationally at-risk student population. Risley's students have not performed well on state standardized tests, and Risley has been assigned the lowest level of school accreditation since 2010. *Compl. ¶ 27-28.*

After repeatedly receiving low accreditation ratings, a state review panel recommended that Risley be wholly managed by an entity other than the School District. *Exh. 1 to Compl., pp. 1-2*.

On November 27, 2018, Risley came before the State Board for review and public comment. After receiving testimony and documents, the State Board directed the Local Board to identify an external partner to manage Risley, present the selection to the State Board for approval, and, if approved, enter into a contract with that external partner ("State Board's Order"). *Exh. 3 to Compl., State Board Order (November 2018)*. The State Board's Order required that the contract between the Local Board and the manager include a term providing that "the local board… delegate to the manager all authority needed to fully manage [the] school[.]" *Id., pp. 9-10*. The State Board also ordered the Local Board to "give appropriate consideration to the recommendations of the manager and not unreasonably withhold [its] approval." *Id., pp. 11*. The Local Board did not challenge the State Board's Order.

The Local Board issued a Request for Proposal to which it received six (6) responses and it unanimously selected MGT to manage Risley. *Compl*. ¶ 54. The State Board approved the selection. *Id*. at ¶ 64.

The School District, governed by the Local Board, contracted with MGT ("School District's Contract with MGT"). *Exh. 8, to Compl. External Management Agreement, pp. 1-2 (April 11, 2019)*. The contract provides, *inter alia*, that the School District "[S]hall delegate to MGT all authority needed to fully manage Risley," and "not unreasonably" withhold its approval of recommendations MGT might make regarding actions requiring formal action by the Local Board. *Id.*

After contracting with the School District, two MGT executives conducted retention interviews with teachers at Risley who expressed their desire to return to the school in 2019-2020. Following Plaintiff Donovan's interview, the School District notified him that he had "been identified as a displaced teacher as a result of the reconstitution of Risley." *Ex. 1 to Resp*.

Finally, Plaintiffs assert that locally-raised funds will be used to satisfy at least part of the Local Board's financial obligations to MGT in violation of the state constitution.

In their Complaint, Plaintiffs asserted the following causes of action: (1) The Education Accountability Act, the State Board's Order, and the School District's contract with MGT violate Article IX, § 15 of the Colorado Constitution, which provides that local school boards "shall have

control of instruction in the public schools of their respective districts,"; (2) The State Board's Order violates Article IX, § 1 of the Colorado Constitution by exceeding the constitution's grant of *general* supervisory authority (emphasis added); (3) The State Board's Order and the School District's Contract with MGT violates state statute setting forth specific duties of local boards of education; (4) The Local Board should be enjoined because it failed to perform its statutory duties; (5) The State Board exceeded its authority because the Act did not authorize it to hold a hearing or approve MGT as the external manager for Risley; (6) Plaintiffs were adversely affected by the State Board's approval of MGT, which Plaintiffs characterize as final agency action subject to judicial review; and, (7) Plaintiffs are entitled to a judgment for declaratory relief.

Defendants now move to dismiss Plaintiffs' claims pursuant to C.R.C. P. 12(b)(1) and 12(b)(5).

II. STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction is governed by C.R.C.P. 12(b)(1). Under the Colorado constitution, district courts have general subject matter jurisdiction in civil cases with the power to consider questions of law and of equity. *SR Condos., LLC v. K. C. Constr., Inc.*, 176 P.3d 866, 869 (Colo. App. 2007). The legislature may limit the jurisdiction of a district court; however, to be effective, the limitation must be explicit. *Id.* at 869. "Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment, not its authority to enter a particular judgment in that class." *Id.* In determining whether subject matter jurisdiction exists, a court must consider the facts alleged and the relief requested. *Id.*

In considering a Rule 12(b)(1) motion, a trial court is authorized to make appropriate factual findings relating to its subject matter jurisdiction and need not treat the facts alleged in the complaint as true. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Where the parties have presented all relevant evidence to the court and the underlying facts relating to jurisdiction are undisputed, the trial court may decide the issue as a matter of law. *Id.* If, however, jurisdictional facts are in dispute, the trial court may hold an evidentiary hearing to resolve any dispute upon which the existence of subject matter jurisdiction depends. *Trinity Broadcasting of Denver v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). A court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Id.*

Under C.R.C.P. 12(b)(5), a party may move to dismiss the other party's claims for "failure to state a claim upon which relief can be granted." A complaint may be dismissed if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

III. ANALYSIS

Plaintiffs' claims turn on allegations of Defendants' constitutional and statutory violations. Specifically, the allegations are premised on the notion that the State Board overstepped its authority and encroached on local control, and that the Local Board impermissibly delegated its authority. Defendants assert that this Court does not have subject matter jurisdiction over this case because Plaintiffs lack standing and, relatedly, the complaint fails to state a claim for relief. The Court will address the Defendants' C.R.C.P. 12(b)(1) Motions to Dismiss and 12(b)(5) Motion to Dismiss in turn.

A. Subject Matter Jurisdiction – Standing

Defendants argue that this Court does not have subject matter jurisdiction over the Plaintiffs' claims because the Plaintiffs, both in their individual and associational capacities, lack standing.

A plaintiff bears the burden of proving that the court has subject matter jurisdiction over the dispute. *City of Boulder v. Public Service Company of Colorado*, 420 P.3d 289, 293 (Colo. 2018). A court does not have subject matter jurisdiction if a plaintiff lacks standing to invoke its judicial power. *Pueblo School Dist. No. 60 v. Colorado High School Activities Ass'n*, 30 P.3d 752, 753 (Colo. App. 2000). To establish standing under Colorado law, a plaintiff must show the following: 1) Plaintiff suffered an injury-in-fact; and 2) Injury was to a legally protected interest. *Reeves-Toney v. School District No. 1 in City and County of Denver*, 442 P.3d 81, 86 (Colo. 2019).

Defendants argue that Plaintiffs have failed to demonstrate injury-in-fact to a legally protected interest. Defendants also assert that the Plaintiffs do not demonstrate associational standing, or standing under the Administrative Procedure Act.

Plaintiffs, however, argue that the named plaintiffs, individually, and the PEA as an association have, indeed, suffered injuries-in-fact to legally protected interests. The individual

Plaintiffs assert that they have suffered injury to a legally protected interest in their tax dollars, Plaintiff Donavan cites injury in the form of displacement from his teaching position at Risley, and the PEA argues that it meets the requirements for associational standing. Finally, the Plaintiffs claim to have APA standing to challenge the State Board's actions and, more broadly, the constitutionality of the Act by which the State Board exercised authority.

1. Injury-in-Fact

The injury-in-fact prong requires Plaintiffs to show "a concrete adverseness which sharpens the presentation of issues that parties argue to the courts." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Standing cannot be conveyed by "the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action." *Id.*

Plaintiffs have asserted the following as a result of the State Board's Order and the School District's Contract with MGT: (a) The individual plaintiffs, as taxpayers, were injured because their tax dollars funded the Local Board's financial obligations to MGT; (b) The School District's Contract with MGT unlawfully delegates certain duties vested in the Local Board to MGT; and (c) The State and Local Boards' actions will cause the School District to breach its collective bargaining agreement with PEA.

While the Colorado Supreme Court has held that "[d]eprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact," none of Plaintiffs' allegations satisfy the injury-in-fact prong.

a) Taxpayer Standing

Colorado case law has recognized "broad taxpayer standing" for citizens to sue to protect "great public concern," however, the injury-in-fact requirement limits this doctrine when plaintiffs challenge allegedly unlawful government action. *Id.*; *Reeves-Toney*, 442 P.3d at 86. The Colorado Supreme Court recently held that to rely on one's status as a taxpayer to confer standing, a plaintiff must demonstrate a "clear nexus" between their taxpayer status and the challenged government action. *Id.* A plaintiff demonstrates this clear nexus "when she challenges the allegedly *unconstitutional expenditure of public funds* to which she has contributed by her payment of taxes." *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1008 (Colo. 2014) (emphasis added) (rejecting the argument that certain costs incidental to the issuance of

allegedly unconstitutional proclamations could establish the requisite nexus). *See also Reeves-Toney*, 442 P.3d at 86 (summarizing Colorado cases where the court found taxpayer standing: "In each of these cases, the alleged unlawful government action concerned the alleged misappropriation or misuse of taxpayer money.").

Plaintiffs contend that the two named members of PEA have standing because they have suffered injury-in-fact by virtue of their taxpayer status. In an attempt to demonstrate the nexus between their status and the challenged management contract with MGT, Plaintiffs allege that their tax dollars, in which they assert a legally protected interest, are funding an unconstitutional delegation of the Local Board's authority.

This Court must consider the character of the actual expenditure as dispositive. As noted by the Defendants, the unconstitutional actions which Plaintiffs complain about are the State Board's Order (allegedly exceeding the State Board's constitutional authority) and the School District's Contract with MGT (allegedly abdicating the Local Board's constitutional duties). The Plaintiffs do not assert that the School District's payment to a contracted third party is, in itself, unconstitutional. Indeed, local school boards are not prohibited from using their allocated public funds to pay for services. Colo. Rev. Stat. § 22-32-122(1) (2018). The Local Board's compensation for MGT's management services was within its right to procure because it constituted lawful payment to a contracted third party in exchange for services, as permitted by the aforementioned statute. Thus, this Court finds that because the actual expenditure of the taxpayers' dollars was not unconstitutional, it cannot create the nexus to satisfy taxpayer standing.

b) Non-Delegation

Plaintiffs allege that the School District's Contract with MGT both violates the constitutional requirement that local boards exercise control of instruction over schools in their districts and abrogates the Local Board's duty to employ teachers and determine the educational programs in its schools. Plaintiffs claim that, by contracting with MGT, the Local Board has impermissibly delegated certain nondelegable authority to MGT, which "encroaches" upon PEA's contractual rights and status.

Plaintiffs have failed to show with specificity how the allegedly impermissible delegation of the Local Board's authority led to a violation of their legally protected interests. Plaintiffs rely on the State Board's Order, which directed the Local Board to assign authority over staff

assignments at Risley to MGT, in contravention of PEA's collective bargaining agreement. They contend that the injury "materialized" when the Local Board complied with the State Board's Order, but they cite no specific instances of injury further than this transfer of authority. Plaintiffs point to provisions in the contract whereby MGT shall provide educational programs, and the Local Board shall not unreasonably withhold its approval of MGT recommendations, yet they do not articulate how this injures them, specifically. For purposes of standing, future injury, and injuries that are overly "indirect and incidental" to defendants' actions, are not injuries-in-fact. *Ainscough*, 90 P.3d at 856. Plaintiffs' injury cannot merely be the Local Board's compliance with the State Board's Order, nor the incidental effects of the Local Board's compliance.

Furthermore, local boards of education *are* permitted to delegate some tasks. In interpreting Colo. Rev. Stat. § 22-32-109 and -110, the Colorado Supreme Court reasoned that the powers and duties granted to school boards by the legislature do not define the scope of delegable functions. *Fremont Re-1 School Dist. v. Jacobs*, 737 P.2d 816, 818 (Colo. 1987) (opting for a more liberal and flexible approach to administrative delegation, which is required for school boards to function smoothly since they have grown in size and complexity).

The Court finds that Plaintiffs' allegations that the Local Board complied with the State Board's Order, contracted MGT to provide educational programs, and agreed to not unreasonably withhold approval of MGT recommendations cannot suffice as Plaintiffs' injuries-in-fact.

c) Interference with Collective Bargaining Agreement

Plaintiffs allege that the Local Board's delegation of authority, as a result of the School District's Contract with MGT, will interfere with PEA's collective bargaining agreement with the School District. They claim that it impairs PEA's status as the sole and exclusive representative of the School District's teachers because, under the collective bargaining agreement, PEA has a contractual right to negotiate for terms and conditions of employment affecting teachers. Aside from stating that the Local Board's action creates "cognizable injuries," however, Plaintiffs do not specifically articulate any direct, non-incidental injuries caused by the management contract's interference with their collective bargaining agreement.

In regards to standing, unnecessary or premature decisions of constitutional questions should be avoided. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3. P.3d 427, 437 (Colo. 2000). Plaintiffs have not filed a grievance regarding an alleged violation of

the collective bargaining agreement, which indicates that they have not yet suffered any injury and their claims here are premature.

Finally, Plaintiff Donavan alleges he was injured when displaced from his teaching position at Risley, and he had a legally protected interest in the termination proceedings under the PEA's collective bargaining agreement. Accepting these facts as true, the court finds that Donavan must first exhaust the grievance remedies set forth in the collective bargaining agreement prior to seeking legal remedy. *Exb. 1, Art. 6-1-1, to Plaintiffs' Resp.*

In light of the allegations and case law, the Court finds that Plaintiffs have only conveyed a remote possibility of future injury to PEA's rights under the collective bargaining agreement, which is insufficient to demonstrate injury-in-fact.

2. Legally Protected Interest

In addition to demonstrating injury-in-fact, Plaintiffs must show that the injury is to a legally protected interest: "An interest is legally protected if the constitution, common law, or a statute, rule, or regulation provides the plaintiff with a claim for relief." *Reeves v. City of Fort Collins*, 170 P.3d 850, 851 (Colo. App. 2007). A legally protected interest may also be one that is "tangible or economic such as one of property, one arising out of contract, one protected against tortious invasions, or one founded on a statute which confers a privilege… On the other hand, the right may protect something intangible such as… an interest in having a government that acts within the boundaries of our state constitution." *Ainscough*, 90 P.3d at 856.

Defendants contend that the legal interests Plaintiffs advance belong to the Local Board or School District, and not to the PEA or its individual members. The challenged State Board Order directs the Local Board, not the PEA or its individual members. *Exb. 3 to Compl., pp. 9-12*. Plaintiffs' allegation that the State Board encroached on the Local Board's autonomy does not give the Plaintiffs a legally protected interest for which they can seek relief because the proper party to claim injury by the State Board's Order would be the Local Board, not the Plaintiffs. *See Reeves*, 170 P.3d. Defendants also contend that the constitutional and statutory provisions at issue contemplate the authority of the local school boards, not the rights of individual teachers or associations. The interests that teachers or associations may have with regards to these constitutional and statutory provisions are "more remote," and do not afford the Plaintiffs standing.

Id. at 86 (distinguishing between litigants who have a right to raise a legal argument or claim and those whose interests are more remote and must address their grievances in a different manner).

Plaintiffs also cite contractual rights arising out of their collective bargaining agreement with the School District. The "injury" they claim is the State and Local Boards' general interference with those contractual rights. Plaintiffs, however, have not shown how the State and Local Boards' actions have demonstrably injured specific contractual rights. Plaintiffs have not filed a grievance regarding an alleged violation of the collective bargaining agreement, nor do they point to any specific provision with which the State and Local Board interfered that resulted in injury to Plaintiffs. Thus, the Court finds that Plaintiffs cannot claim injury-in-fact to their collective bargaining agreement rights as a basis for standing.

3. Associational Standing

An association may have standing to seek judicial relief for injuries to rights of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; *and* (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *Colorado Manufactured Housing Ass'n v. Pueblo County*, 857 P.2d 507, 514 (Colo. App. 1993).

Plaintiffs claim PEA has associational standing because (1) its individual members have taxpayer standing, (2) PEA seeks to protect interests that are germane to its purpose of advancing the interests of the teachers it represents, and (3) the claims and relief requested do not require the participation of individual PEA members.

Defendants contend that because Plaintiffs are attempting to demonstrate associational standing under the theory that PEA's individual members have taxpayer standing, the taxpayers' interests are not germane to the PEA's purpose of advancing the interests of the teachers it represents.

Notably, the case that Plaintiffs cite to demonstrate the criteria for taxpayer standing, *Colorado Union of Taxpayers Foundation v. City of Aspen*, indicates that the first criterion of the individual members' standing and the second criterion of the organization's purpose are, indeed, related. 418 P.3d 506 (Colo. 2018) (finding associational standing because the organization's members had taxpayer standing and the organization was formed to educate the public as to the dangers of excessive taxation). Thus, while the contractual rights under the collective bargaining

agreement the PEA seeks to protect may be germane to its purpose of advancing the interests of the teachers it represents, Plaintiffs do not go so far as to say that taxpayer interests are germane to the PEA's purpose.

The Court does not find that Plaintiffs demonstrated taxpayer standing for the PEA's individual members. *Supra p. 7.* And, even had they met the first criterion of the associational standing test, Plaintiffs did not assert that taxpayer interests are germane to the PEA's organizational purpose.

4. APA Standing

The Colorado Supreme Court has ruled that the right to judicial review of the final administrative actions of an agency "is limited to those parties to the proceeding before the administrative agency whose rights, privileges or duties, as distinct from those of the State, are adversely affected by the decision." *Board of County Com'rs of Otero County v. State Bd. Of Social Services*, 528 P.2d 244, 248 (Colo. 1974).

Plaintiffs were not parties to the State and Local Boards' proceedings to select a management partner, and they were not the party directed by the State Board's Order. Furthermore, they challenge the State Board's Order more than five months after it was issued. Plaintiffs' challenge, as an appeal under the Administrative Procedure Act, is untimely because it was not filed within 35 days of the November 27, 2018, order. Colo. Rev. Stat. § 24-4-106(4). Plaintiffs claim that their complaint was timely filed within 35 days of the April 10, 2019 approval of MGT as the management entity; however, it is not the approval of MGT but the State Board's Order that Plaintiffs challenge as unconstitutional. It is the State Board's Order directing the Local Board to select a management partner, constituting "final agency action" subject to APA, that Plaintiffs challenge. Therefore, it is the date of the State Board's Order that is relevant to the timeliness of their APA appeal.

Nevertheless, Plaintiffs contend that their non-party status to the State Board's adjudication and the date of their filing do not bar them from bringing their claim because the Education Accountability Act of 2009 is, itself, unconstitutional. Plaintiffs assert that the Act "violates Article IX, § 15 to the extent that it removes from a local school board all discretion and control as to the content of the instruction provided, with the school district's funds, to students who attend a school

partially or wholly managed by a private or public entity other than the school district." *Compl*. ¶ 84.

Plaintiffs cannot challenge the constitutionality of the Act as-applied because "[t]o prevail on an as-applied constitutional challenge, the challenging party must establish that the statute is unconstitutional under the circumstances in which *the plaintiff has acted or proposes to act.*" *People v. King*, 401 P.3d 516, 517 (Colo. 2017) (emphasis added). Here, the Plaintiffs are complaining of the State and Local Boards' actions under the Act, not Plaintiffs' own actions.

A facial challenge, however, "can succeed only if the complaining party shows that the statute is unconstitutional in all of its applications." *People v. Boles*, 280 P.3d 55, 59 (Colo. App. 2011). Plaintiffs have not shown, nor do they appear to allege, that the Act is unconstitutional in all of its applications. Instead, they argue that the Act is unconstitutional because it has allowed the State Board to exceed its "general" supervisory authority. The Court declines to define the scope of the State Board's authority. Absent a facial or as-applied challenge to the constitutionality of the Act, Plaintiffs cannot argue that their constitutional challenge gives them standing.

Because the Plaintiffs have failed to demonstrate injury-in-fact to a legally protected interest, either at the individual level or as an association, and because Plaintiffs lack standing under the APA, the Court does not have subject matter jurisdiction over Plaintiffs' claims.

B. Failure to State a Claim

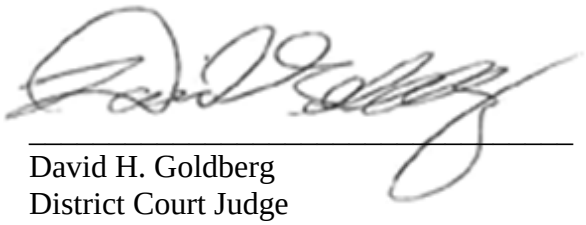
Defendant Local Board also filed a Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted under C.R.C.P. 12(b)(5). Because the Court's resolution that this case be dismissed *with prejudice* under C.R.C.P. 12(b)(1), it need not address the Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted.

ORDER

Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction are GRANTED. This case is DISMISSED *with prejudice*.

DATED this 18th day of October 2019

BY THE COURT:



David H. Goldberg
District Court Judge